No. 09-420

NOV 4 - 2009

In The

Supreme Court of the United States

LINDA LEWIS,

Petitioner,

v.

CITY OF WEST PALM BEACH, FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts analyzed and applied the proper legal standards when determining whether the individual officers were entitled to qualified immunity.

LIST OF PARTIES

Petitioner, Linda Lewis (Lewis), the mother of the decedent Donald Lewis (Decedent) and the personal representative of the Estate of Donald Lewis was the Plaintiff in the district court action and was the appellant in the Eleventh Circuit.

Respondent, City of West Palm Beach, is a municipality in Palm Beach County, Florida and was a defendant in the district court action and an appellee in the Eleventh Circuit.

Respondents, individuals, were defendants in the district court action and were appellees in the Eleventh Circuit. They are:

Officer Raymond Shaw
Officer Thelton Luke
Officer Robert Leroy Root, III
Officer Audrey Dunn
Officer Randall Maale

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OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISION INVOLVED

Respondents agree with the statement of the Opinions Below, Jurisdiction and Statutory Provision Involved as stated in the Petition.

STATEMENT OF THE CASE

Linda Lewis' Petition should be denied. The Eleventh Circuit's opinion represents the appropriate application of this Court's precedent to the facts of this case.

Linda Lewis (Lewis) petitions the Court for review of the Eleventh Circuit's March 11, 2009 decision affirming the district court's grant of summary judgment in favor of the City of West Palm Beach (City), Officer Raymond Shaw (Shaw), Officer Thelton Luke (Luke), Officer Randall Maale (Maale), Officer Robert Leroy Root, III (Root) and Officer Audrey Dunn (Dunn) on Lewis' Fourth Amendment excessive force, failure to train and state law wrongful death claims.

While in the custody of five police officers Donald Lewis died. Linda Lewis filed an 42 U.S.C. §1983 action against the City, Shaw, Luke, Root, Dunn and Maale, Langley Productions, Danny Jeffery and Zach

Ragsdale[1] in the United States District Court, Southern District of Florida on December 11, 2006, claiming that the City and the five individual officers violated Donald Lewis' right to be free from the use of excessive force in the course of a lawful seizure and that the City failed to adequately train its officers on the use of "hobble" cords.[2]

Also, Lewis asserted a state law wrongful death claim for the alleged gross negligence of the five individual officers.

In granting summary judgment in favor of Shaw, Luke, Root, Dunn and Maale, the district court recognized, pursuant to this Court's opinion in *Saucier v. Katz*, that the threshold question was whether Donald Lewis' constitutional rights were violated. App. 22a ("*See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts to address the constitutional issue before the question of qualified

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[1] Langley Productions produces the television show "COPS." Danny Jeffery and Zach Ragsdale were part of the camera crew assigned by COPS to follow Officer Shaw. Danny Jeffery and Zach Ragsdale created a video recording of the entire incident, however, they were dropped from the lawsuit on November 29, 2007. The parties agree that the video is an accurate representation of the disputed events. App. 19a, n.1.

[2] "A hobble cord is a nylon strap with a metal snap at one end that can connect to a pair of handcuffs and a permanent loop on the other end that can secure ankles, knees, or elbows." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278, n.5 (11th Cir. 2004).

immunity")).[3] Accordingly, the court first addressed whether the officers violated Donald Lewis' Fourth Amendment rights.

The district court found that Donald Lewis posed a danger to himself, the officers and passing motorists; and that the application of a "hobble" was objectively reasonable; as was, generally, the use of force by the officers. The court, nevertheless, concluded that there was a genuine issue of material fact as to whether Shaw, Root and Luke violated Donald Lewis' rights under the Fourth Amendment by kneeling on Donald Lewis' upper back and neck after he was handcuffed and by pushing Donald Lewis' legs down toward his body in an awkward manner.

The district court next evaluated the individual officers, qualified immunity defense. The court noted that the plaintiff must show that the constitutional right was clearly established at the time of the alleged violation such that (1) it would be clear to a reasonable officer that his conduct was unlawful; or (2) it would ensure that the officers had fair warning that their conduct was unconstitutional. The court noted that there are three ways a constitutional right is clearly established under the Eleventh Circuit's framework: (1) a case with indistinguishable material

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[3] This Court recently receded from *Saucier v. Katz*, 533 U.S. 194 (2001), holding that courts need not first address the violation of constitutional rights before resolving qualified immunity claims. *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

facts has been decided in the Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the pertinent state, (2) a case provides a broad statement of principle to "clearly establish" certain conduct as unconstitutional, and (3) the alleged conduct is so egregious that the right is clearly established in the absence of case law. Lewis conceded that there was no case, with facts even vaguely similar, holding that use of a hobble restraint or hog-tie[4] was unconstitutional. The court found untenable Lewis' argument that the Eleventh Circuit had provided a broad statement of principle making the use of hog-ties unreasonable. App. 32a ("When considered all together, the differences between *Mercado* and the instant case are too great for the court to conclude that any 'broad principle' created or referenced in *Mercado* was enough to give the officers in this case fair warning that their conduct violated the Constitution."). The court next concluded that the force used to restrain Lewis was not so obviously unconstitutional that, even in the absence of case law,

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[4] Petitioner uses the terms fetter, hobble and hog-tie interchangeably as words to describe the means used to secure Donald Lewis. The Eleventh Circuit has noted, however, that use of the word hogtie should be supported by sufficient evidence establishing the distance between the hands and the feet. *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278, n.6 (11th Cir. 2004). Moreover, the Tenth Circuit has noted that a hog-tie restraint involves an individual's bound ankles being tied to his bound wrists with less than twelve inches between them; a distance of more than twelve inches is a hobble. *Weigel v. Broad*, 544 F.3d 1143, 1170 (10th Cir. 2008).

qualified immunity was inappropriate. Accordingly, the district court found that the officers were entitled to qualified immunity. The court entered summary judgment for Shaw, Luke, Root, Maale and Dunn.

The court next considered both Lewis' failure to train and wrongful death claims against the City. The court noted that a municipality's failure to adequately train its officers can constitute a municipal custom or policy where the lack of training reflects a deliberate indifference to the rights of people with whom the police come into contact. The court noted that deliberate indifference can be established when (1) the municipality is aware of a pattern of constitutional violations by its officers and fails to adequately train them; or (2) the need for more or different training is so obvious that the municipality's policymakers must have known of it. Lewis conceded there was no evidence of any prior incidents of excessive force that would have alerted the City to a need for additional training. The court rejected Lewis' argument that the City's alleged failure to adequately train its officers in the proper use of hobble restraints constituted deliberate indifference. App. 36a ("Plaintiff has thus not produced sufficient evidence showing that the city was deliberately indifferent to the risk of constitutional violations.").

The court next concluded that Lewis failed to state a Florida state law claim for excessive force. The court noted that Florida law does not recognize a cause of action for the negligent use of force in making an arrest. App. 37a ("the amended complaint

in this case alleges that the officers' use of force was negligent, rather than intentionally excessive. *See* Pl.'s Am. Compl. ¶47."). The court entered summary judgment for the City on both counts.

The Eleventh Circuit affirmed the district court's grant of summary judgment in favor of Shaw, Luke, Root, Dunn, Maale and the City. Citing this Court's opinion in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), the Eleventh Circuit declined to examine the potential constitutional violation and instead analyzed whether the officers' conduct infringed a clearly established right. App. 6a ("The Supreme Court recognized that discussion of a constitutional violation may become unnecessary for qualified immunity purposes when the right was not clearly established. It is therefore not mandated that the Court examine the potential constitutional violation under *Saucier* step one prior to analyzing whether the right was clearly established under step two."). The court, however, expressly found that the officers use of a hog-tie in this case and in similar cases did not violate the Fourth Amendment. App. 10a ("Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004), hog-tying or "fettering" under the given circumstances does not violate the Fourth Amendment."); *See Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996).

Lewis claimed that the officers' restraint of Lewis with a hobble and eventual hog-tie after the need for any use of force had passed was so far beyond the hazy border between excessive and acceptable force

that the officers had to know they were violating the Constitution without case law on point. The court observed that Lewis was a safety risk to himself and others and that he never remained compliantly restrained. The court concluded that the officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right. The court found that the officers were insulated by qualified immunity.

The court next addressed Lewis' claim that the City was liable under 42 U.S.C. §1983 for its failure to provide adequate law enforcement officer training on the use of hobbles. Lewis argued that the need for proper training on the use of hobbles and the proper placement of weight on an arrestee's back was "so obvious" that the City's failure to adequately train the officers amounted to deliberate indifference. The court rejected Lewis' argument. The court found that the proper use of the hobble restraint does not rise to the level of obvious probability for constitutional violations so as to create municipal liability. The court further noted that the City did provide training on the proper use of hobbles and that the City had a policy not to hog-tie arrestees. Accordingly, the court found that the City was not deliberately indifferent to a potentially obvious constitutional violation.

The court next rejected Lewis' claim of wrongful death because there is no cause of action in Florida for the negligent use of force.

The court affirmed summary judgment on all claims. Lewis now petitions this court for certiorari review.

REASONS FOR DENYING THE PETITION

The Petitioner has presented no compelling reasons for this Court to grant her Petition for Writ of Certiorari. See Sup. Ct. R. 10. The Petitioner incorrectly asserts that the court's decision in this case conflicts with the Fifth Circuit decision in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) and this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002).

The Eleventh Circuit properly evaluated qualified immunity in this case in a manner entirely consistent with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Hope* and its progeny. Thus, certiorari should be denied because any ruling in this case would not resolve any circuit conflict, nor add anything to the general jurisprudence regarding qualified immunity.

I. CERTIORARI IS NOT WARRANTED BECAUSE THE DECISION IN THIS CASE DOES NOT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN *GUTIERREZ* OR THIS COURT'S DECISION IN *HOPE*.

The Eleventh Circuit's opinion in this case is not in conflict with the Fifth Circuit's decision in *Gutierrez,* nor this Court's decision in *Hope*.

It has been long recognized that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The right that the official is alleged to have violated must be clearly established, in a particularized rather than general sense, so that the official is on notice that the alleged conduct is unlawful. *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987) ("[B]ut if the test of 'clearly established law' were to be applied [too generally], it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading."); *See Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force' . . . and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.").

This Court has recognized that some conduct, however, is so egregious that "[a] general constitutional rule may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held

unlawful.'" *Hope v. Pelzer*, 536 U.S. 730 (2002) (*citing Anderson*, *supra*, at 640).

The Eleventh Circuit's decision in this case is not in conflict with *Hope*. In deciding this case, the Eleventh Circuit observed, pursuant to this Court's precedent, that a right may be clearly established by specific case law; broad statements of principle within the constitution, statutes or case law; or through the obviously egregious nature of the conduct. App. 6a. The court affirmed summary judgment in this case because it found no precedent which, either specifically or broadly, established that an uncooperative detainee had a right not to be hobbled or hog-tied and because the officers' attempts to restrain Lewis were not so egregious that the officers should have known that their conduct was unconstitutional. App. 8a ("[T]he officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right."). The court expressly noted, pursuant to Eleventh Circuit precedent, hog-tying under the circumstances of this case was not a constitutional violation. App. 10a ("Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004), hog-tying or 'fettering' under the given circumstances does not violate the Fourth Amendment."). Therefore, the Eleventh Circuit's ruling in this case properly applied this Court's precedent.

Likewise, the Eleventh Circuit's opinion is not in conflict with the Fifth Circuit. In *Gutierrez*, which

was decided before *Saucier*, *Hope* and *Pearson*, the Fifth Circuit found that material disputes of fact prevented them from determining whether officers' hog-tying an arrestee was objectively reasonable. The court noted that *Tennessee v. Garner*, 471 U.S. 1 (1985), clearly established that police use of deadly force, when the suspect does not pose a threat of serious physical harm, violated the Fourth Amendment. Thus the court, employing tenuous reasoning, suggested that qualified immunity could be denied if the plaintiff proved that using a hog-tie restraint, under the circumstances, constituted deadly force.[5] The court found that the general test set out in *Garner* gave fair warning to the officers that use of any police weapon could constitute deadly force.

This Court, however, expressly rejected such reasoning in *Brosseau v. Haugen*, 543 U.S. 194 (2004), finding that it is a mistake to find fair warning in the general test set out in *Garner*. This Court reasoned that *Garner* is "cast at a high level of generality" and can only clearly establish fair warning in an obvious clarity case similar to *Hope*. Thus, Petitioner's reliance on *Gutierrez* is misplaced.

Assuming *arguendo* that Petitioner is correct that the Eleventh Circuit's opinion conflicts with the

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[5] The Fifth Circuit later emphasized that its major concern in *Gutierrez* was the danger of the hogtie restraint when coupled with a lack of monitoring. *Sanders-Burns v. City of Plano*, 578 F.3d 279, 292, n.6 (5th Cir. 2009).

Fifth Circuit's opinion, it is unfair to expose police officers to civil liability due to disagreement among judges on a constitutional question. *Pearson v. Callahan*, 129 S.Ct. 808, 823 (2009) ("'[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'"). The Petitioner effectively seeks a ruling that all hobble restraints are unconstitutional, however, two other circuit courts of appeal have expressly declined to do so. *Weigel v. Broad*, 544 F.3d 1143, 1170 (10th Cir. 2008), *cert. denied*, *Broad v. Weigel*, 129 S.Ct. 2387 (2009) (O'Brien, J., dissent) ("In *Cruz* we expressly did not forbid all hog-ties let alone the less restrictive hobble."); *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997) (finding use of a hobble reasonable where individual resisted arrest).

Notably, this case differs from "gratuitous force" cases decided in the Eleventh and other circuits because Donald Lewis continued to struggle and was never compliant after he was restrained.

Accordingly, Petitioner cannot deny that the Eleventh Circuit properly analyzed and applied the proper legal standards set out by this Court regarding the applicability of qualified immunity. Thus, Petitioner's disagreement is with the application of this Court's precedent to the facts of this case.

CONCLUSION

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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